

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

BENNIGAN'S FRANCHISING COMPANY, L.P. §  
BENNIGAN'S FRANCHISING COMPANY, LLC §

Plaintiffs, §

v. §

THE SWEET ONION, INC., et al., §

Defendants. §

Civil Action No. 08-CV-2132-F

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**PLAINTIFFS' ANSWER TO DEFENDANTS BENNI-5461, L.P., BENNI-5462, L.P.,  
BENNI-5848, L.P., AND BENNI-5849, L.P.'S COUNTERCLAIM**

COMES NOW Plaintiffs Bennigan's Franchising Company, L.P. and Bennigan's Franchising Company, LLC (collectively "BFC") and submits this Answer to Defendants Benni-5461, L.P., Benni-5462, L.P., Benni-5848, L.P. and Benni-5849, L.P.'s Counterclaim (collectively, "Defendants").

**FIRST AFFIRMATIVE DEFENSE**

Defendants' counterclaims fail to state a claim for relief.

**SECOND AFFIRMATIVE DEFENSE**

Defendants' counterclaim for breach of contract are barred by Defendants' prior breaches of their respective franchise agreements.

**THIRD AFFIRMATIVE DEFENSE**

Defendants' counterclaims are barred by release.

**FOURTH AFFIRMATIVE DEFENSE**

Defendants' counterclaims are barred by unclean hands.

**FIFTH AFFIRMATIVE DEFENSE**

Defendants' counterclaims are barred by estoppel.

**SIXTH AFFIRMATIVE DEFENSE**

Defendants' counterclaims are barred by waiver.

**SEVENTH AFFIRMATIVE DEFENSE**

Defendants' counterclaims are barred by the applicable statute of limitations.

**EIGHTH AFFIRMATIVE DEFENSE**

Defendants' counterclaims are barred by the terms of the parties' franchise agreements including, without limitation, the integration clause, representations, acknowledgments, damages limitations, and agreed-upon statute of limitation period.

**NINTH AFFIRMATIVE DEFENSE**

Defendants' counterclaims are barred because the Defendants are not authorized to conduct business in the State of Texas.

**TENTH AFFIRMATIVE DEFENSE**

Defendants' counterclaims are barred because Defendants failed to comply with the applicable conditions precedent.

**ELEVENTH AFFIRMATIVE DEFENSE**

Defendants' counterclaims are barred because BFC is exempt from the statutes at issue.

**TWELFTH AFFIRMATIVE DEFENSE**

Defendants' counterclaims are barred by setoff.

**THIRTEENTH AFFIRMATIVE DEFENSE**

Defendants' counterclaims are barred because the issues allegedly subject to the request for declaratory judgment are moot and no longer justiciable controversies.

**FOURTEENTH AFFIRMATIVE DEFENSE**

By way of further defense, BFC responds as following to the individual paragraphs of Defendants' counterclaims:

**BFC'S RESPONSE TO DEFENDANTS' COUNTERCLAIM**

**I. NATURE OF THE CASE**

1. BFC denies the allegations contained in this paragraph.
2. BFC denies the allegations contained in this paragraph.
3. BFC denies the allegations contained in this paragraph.
4. BFC denies the allegations contained in this paragraph.
5. BFC denies the allegations contained in this paragraph.
6. BFC admits that it sent a notice of default to the Defendants for non-payment of fees owed under the Defendants' respective franchise agreements. BFC further admits that it filed the present lawsuit. BFC denies the remaining allegations contained in this paragraph.
7. Paragraph 7 does not purport to plead any facts, and therefore it requires no response from BFC. To the extent Paragraph 7 requires a response, BFC denies the allegations contained in this paragraph.

**II. PARTIES**

8. BFC denies the allegations contained in this paragraph.
9. BFC admits the allegations contained in this paragraph.
10. BFC admits that in July 1989, S&A was sold to a group consisting of the principal officers of S&A, and that at that time, S&A was an affiliate of the Metromedia Company. BFC denies the remaining allegations contained in this paragraph.
11. BFC denies the allegations contained in this paragraph.

### **III. THE BENNI AGREEMENTS**

12. BFC admits that on or about March 20, 2001, Defendant Benni-5461 entered into a Franchise Agreement to operate a Bennigan's restaurant in Round Rock, Texas. BFC admits that on or about March 20, 2001, Defendant Benni-5848 entered into a Franchise Agreement to operate a Bennigan's restaurant in Round Rock, Texas. BFC admits that on or about February 18, 2005, Defendant Benni-5849 entered into a Franchise Agreement to operate a Bennigan's restaurant in Round Rock, Texas. BFC admits that on or about July 31, 2007, Defendant Benni-5462 entered into a Franchise Agreement to operate a Bennigan's restaurant in Round Rock, Texas.

13. BFC admits that the Round Rock and Austin restaurants were closed at some point in time, but BFC does not have sufficient information or knowledge to either admit or deny whether the closure was permanent. BFC denies the remaining allegations contained in this paragraph.

14. BFC denies the allegations contained in this paragraph.

### **IV. THE AGREEMENTS' OPERATIVE PROVISIONS**

15. BFC states that the terms of its franchise agreements speak for themselves. BFC denies the remaining allegations contained in this paragraph.

16. BFC states that the terms of its franchise agreements speak for themselves. BFC denies the remaining allegations contained in this paragraph.

17. BFC denies the allegations contained in this paragraph.

18. BFC denies the allegations contained in this paragraph.

### **V. FACTS**

#### **A. Bennigan's Formation and Growth**

19. BFC admits the allegations contained in this paragraph.

- 20. BFC admits the allegations contained in this paragraph.
- 21. BFC denies the allegations contained in this paragraph.
- 22. BFC admits the allegations contained in this paragraph.
- 23. BFC admits that the number and location of Bennigan's restaurants expanded from the inception of the Bennigan's restaurant concept. Bennigan's is without sufficient knowledge or information to either admit or deny the remaining allegations contained in this paragraph.

**B. Metromedia's Purchase and Corporate Integration of Bennigan's**

- 24. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.
- 25. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.
- 26. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.
- 27. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.
- 28. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

29. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

30. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

**C. Deterioration of the Brand and Financial Crisis**

31. BFC denies the allegations contained in this paragraph.

32. BFC denies the allegations contained in this paragraph.

33. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

34. BFC denies the allegations contained in this paragraph.

35. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

36. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

**D. Metromedia Files for Bankruptcy, and Atalaya and Fortress Assume Control of Bennigan's**

37. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

38. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC states that it does not have sufficient information to either admit or deny the allegations contained in this paragraph.

39. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC states that it does not have sufficient information to either admit or deny the allegations contained in this paragraph.

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does not have sufficient information to either admit or deny the allegations contained in this paragraph.

44. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC states that it does not have sufficient information to either admit or deny the allegations contained in this paragraph.

45. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC states that it does not have sufficient information to either admit or deny the allegations contained in this paragraph.

46. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC states that it does not have sufficient information to either admit or deny the allegations contained in this paragraph.

47. BFC admits that it did not file for bankruptcy protection in 2008. BFC denies the remaining allegations contained in this paragraph.

48. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC states that it does not have sufficient information to either admit or deny the allegations contained in this paragraph.

49. BFC denies the allegations contained in this paragraph.



**E. The Bankruptcy's Devastating Effect on Franchisees**

50. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

51. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph..

52. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

53. BFC denies the allegations contained in this paragraph.

54. BFC denies the allegations contained in this paragraph.

55. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

56. BFC denies the allegations contained in this paragraph.

**F. BFC's Post-Bankruptcy Default to Its Franchisees**

57. BFC denies the allegations contained in this paragraph.

58. BFC denies the allegations contained in this paragraph.

59. BFC denies the allegations contained in this paragraph.

60. BFC admits that on November 3, 2008, certain defendants in the lawsuit sent a letter to BFC. BFC denies the remaining allegations contained in this paragraph.

61. BFC admits that the terms of the defendants' franchise agreements speak for themselves. BFC denies the remaining allegations contained in this paragraph.

62. BFC admits that it sent notices of default to the defendants in this lawsuit for failure to pay fees owed under their respective franchise agreements. BFC denies the remaining allegations contained in this paragraph.

63. BFC admits that it filed this lawsuit, the terms of which speak for themselves. BFC denies the remaining allegations contained in this paragraph.

64. BFC denies the allegations contained in this paragraph.

## **VI. CAUSES OF ACTION**

### **FIRST CAUSE OF ACTION** **(Material Breach)**

65. BFC restates and realleges its prior defenses and responses as if fully contained herein.

66. BFC denies the allegations contained in this paragraph.

67. BFC denies the allegations contained in this paragraph.

68. BFC admits that the terms of its franchise agreements speak for themselves. BFC denies the remaining allegations contained in this paragraph.

69. BFC denies the allegations contained in this paragraph.

70. BFC denies the allegations contained in this paragraph.

71. BFC denies the allegations contained in this paragraph.

72. BFC denies the allegations contained in this paragraph.

### **SECOND CAUSE OF ACTION** **(Implied Covenant of Good Faith and Fair Dealing)**

73. BFC restates and realleges its prior defenses and responses as if fully contained herein.

74. This Count has been dismissed by the Court, and therefore it requires neither an admission or denial by BFC. To the extent that a response is required, BFC denies the allegations contained in this paragraph.

75. This Count has been dismissed by the Court, and therefore it requires neither an admission or denial by BFC. To the extent that a response is required, BFC denies the allegations contained in this paragraph.

76. This Count has been dismissed by the Court, and therefore it requires neither an admission or denial by BFC. To the extent that a response is required, BFC denies the allegations contained in this paragraph.

**THIRD CAUSE OF ACTION**  
**(Breach of Fiduciary Duty)**

77. BFC restates and realleges its prior defenses and responses as if fully contained herein.

78. BFC denies the allegations contained in this paragraph.

79. BFC denies the allegations contained in this paragraph.

80. BFC denies the allegations contained in this paragraph.

81. BFC denies the allegations contained in this paragraph.

82. BFC denies the allegations contained in this paragraph.

83. BFC denies the allegations contained in this paragraph.

84. BFC denies the allegations contained in this paragraph.

85. BFC denies the allegations contained in this paragraph.

86. BFC denies the allegations contained in this paragraph.

**FOURTH CAUSE OF ACTION**  
**(Pierce the Veil/Alter Ego – Metromedia and John Does 1-5)**

87. BFC restates and realleges its prior defenses and responses as if fully contained herein.

88. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

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94. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

**FIFTH CAUSE OF ACTION**  
**(Pierce the Veil – John Does 6-10)**

95. BFC restates and realleges its prior defenses and responses as if fully contained herein.

96. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

97. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

98. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

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103. This paragraph is not directed at BFC, and therefore requires neither an admission nor a denial from BFC. To the extent that a response to this paragraph is required, BFC denies the allegations contained in this paragraph.

**SIXTH CAUSE OF ACTION**  
**(Fraud)**

- 104. BFC restates and realleges its prior defenses and responses as if fully contained herein.
- 105. BFC denies the allegations contained in this paragraph.
- 106. BFC denies the allegations contained in this paragraph.
- 107. BFC denies the allegations contained in this paragraph.
- 108. BFC denies the allegations contained in this paragraph.
- 109. BFC denies the allegations contained in this paragraph.
- 110. BFC denies the allegations contained in this paragraph.

**SEVENTH CAUSE OF ACTION**  
**(Negligent Misrepresentation)**

- 111. BFC restates and realleges its prior defenses and responses as if fully contained herein.
- 112. BFC denies the allegations contained in this paragraph.
- 113. BFC denies the allegations contained in this paragraph.

**EIGHTH CAUSE OF ACTION**  
**(Declaratory Judgment – Non-Compete)**

- 114. BFC restates and realleges its prior defenses and responses as if fully contained herein.
- 115. BFC admits that the terms of its franchise agreements speak for themselves. BFC denies the remaining allegations contained in this paragraph.
- 116. BFC denies the allegations contained in this paragraph.
- 117. BFC denies the allegations contained in this paragraph.
- 118. BFC denies the allegations contained in this paragraph.

119. BFC denies the allegations contained in this paragraph.

120. BFC denies the allegations contained in this paragraph.

121. BFC does not have sufficient information to either admit or deny the allegations contained in this paragraph.

122. BFC does not have sufficient information to either admit or deny the allegations contained in this paragraph.

123. BFC denies the allegations contained in this paragraph.

124. BFC denies the allegations contained in this paragraph.

125. BFC denies the allegations contained in this paragraph.

126. BFC denies the allegations contained in this paragraph.

**NINTH CAUSE OF ACTION**  
**(Tortious Interference With Prospective Economic Relations)**

127. BFC restates and realleges its prior defenses and responses as if fully contained herein.

128. This Count has been dismissed by the Court, and therefore it requires neither an admission nor a denial by BFC. To the extent that a response is required, BFC denies the allegations contained in this paragraph.

129. This Count has been dismissed by the Court, and therefore it requires neither an admission nor a denial by BFC. To the extent that a response is required, BFC denies the allegations contained in this paragraph.

130. This Count has been dismissed by the Court, and therefore it requires neither an admission nor a denial by BFC. To the extent that a response is required, BFC denies the allegations contained in this paragraph.

131. This Count has been dismissed by the Court, and therefore it requires neither an admission nor a denial by BFC. To the extent that a response is required, BFC denies the allegations contained in this paragraph.

**TENTH CAUSE OF ACTION**  
**(Violation of Deceptive Trade Practices Act)**

132. BFC restates and realleges its prior defenses and responses as if fully contained herein.

133. BFC denies the allegations contained in this paragraph.

134. BFC denies the allegations contained in this paragraph.

135. BFC denies the allegations contained in this paragraph.

136. BFC denies the allegations contained in this paragraph.

137. BFC denies the allegations contained in this paragraph.

138. BFC denies the allegations contained in this paragraph.

139. BFC denies the allegations contained in this paragraph.

140. BFC denies the allegations contained in this paragraph.

141. BFC denies the allegations contained in this paragraph.

142. BFC denies the allegations contained in this paragraph.

143. BFC denies each and every allegation, averment, prayer, matter, or thing contained in Defendants' Counterclaim not herein admitted, controverted, or specifically denied. Further, BFC denies that Defendants are entitled to any of the damages or relief prayed for and further denies that BFC is liable to any of the Defendants in any manner whatsoever.

WHEREFORE, having fully stated their Answer and Affirmative Defenses to Defendants' Counterclaim, Plaintiffs respectfully pray that this Court dismiss Defendants' Counterclaim, and all counts therein, with prejudice, enter judgment in favor of Plaintiffs and against Defendants on all counts of Plaintiffs' Complaint, tax all costs of this action against



Plaintiff, and order such other and further relief as the Court deems just and proper under the circumstances.

Dated: June 7, 2010

Respectfully submitted,

/s/ Jason S. Bell

Eric W. Pinker, P.C. (TSBN 16016550)

Kent D. Krabill (TSBN 24060115)

**LYNN TILLOTSON PINKER & COX, LLP**

2100 Ross Avenue

Suite 2700

Dallas, Texas 75201

(214) 981-3800 Phone

(214) 981-3839 Fax

Jason S. Bell

Georgia Bar No. 048530

Admitted *Pro Hac Vice*

John R. Autry

Georgia Bar No. 029029

Admitted *Pro Hac Vice*

Smith, Gambrell & Russell, LLP

Promenade II, Suite 3100

1230 Peachtree Street, NE

Atlanta, Georgia 30309-3592

Telephone: 404-815-3500

Facsimile: 404-815-3509

jbell@sgrlaw.com

jautry@sgrlaw.com

**COUNSEL FOR PLAINTIFFS**

**BENNIGAN'S FRANCHISING COMPANY, LP**

**BENNIGAN'S FRANCHISING COMPANY, LLC**

**CERTIFICATE OF SERVICE**

On June 7, 2010, my office electronically filed this document. The Court's electronic filing system sends notice of this filing to all parties who have appeared.

/s/ Jason S. Bell

Eric W. Pinker, P.C. (TSBN 16016550)

Kent D. Krabill (TSBN 24060115)

**LYNN TILLOTSON PINKER & COX, LLP**

2100 Ross Avenue

Suite 2700

Dallas, Texas 75201

(214) 981-3800 Phone

(214) 981-3839 Fax

Jason S. Bell

Georgia Bar No. 048530

Admitted *Pro Hac Vice*

John R. Autry

Georgia Bar No. 029029

Admitted *Pro Hac Vice*

Smith, Gambrell & Russell, LLP

Promenade II, Suite 3100

1230 Peachtree Street, NE

Atlanta, Georgia 30309-3592

Telephone: 404-815-3500

Facsimile: 404-815-3509

jbell@sgrlaw.com

jautry@sgrlaw.com

**COUNSEL FOR PLAINTIFFS**

**BENNIGAN'S FRANCHISING COMPANY, LP**

**BENNIGAN'S FRANCHISING COMPANY,**

**LLC**